

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 204-2018:

AMANDA TALARICO,)	
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
APPLIED MATERIALS, INC.,)	
)	
Respondent.)	

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I. PROCEDURAL AND PRELIMINARY MATTERS

Charging Party Amanda Talarico (Talarico) has alleged that her employer and Respondent herein, Applied Materials, Inc., (Applied Materials) discriminated against her on the basis of her sex. Talarico is represented by Santana Caballero of Kortum Law Office, PLLC. Applied Materials, Inc., is represented by Jason S. Ritchie and Michael P. Manning of Ritchie Manning Kautz, PLLP.

On June 4, 2018, Applied Materials filed a Motion in Limine and Motion to Quash Subpoena regarding David Kryzewski (Kryzewski). The basis of the motion was that Kryzewski had never been disclosed as a witness or potential comparator in either Talarico’s discovery responses or final pre-hearing disclosures. Although the original hearing date was subsequently delayed at the request of Talarico’s counsel and the subpoena rendered moot, disclosure deadlines were not altered and counsel for Applied Materials renewed the motion. Following briefing on the matter, the Hearing Officer granted Applied Material’s motion; Talarico was not permitted to call Kryzewski as a witness for her case-in-chief, but was permitted to call him as a rebuttal witness if necessary. She ultimately did not do so.

Hearing Officer Chad R. Vanisko convened a contested case hearing in the matter on September 13th and 14th, 2018, in Kalispell, Montana. The hearing was continued, and a recorded, after-hours, on-site visit at Applied Materials’ Birch Grove

facility was conducted with the parties and counsel on October 22, 2018, while the hearing itself reconvened on October 23, 2018. At hearing, Alan Johnson , Jonathan Kuntz, Gordon Senkyr, Brandon Bickell, Talarico, and Julie Blodgett all testified under oath.

Charging Party's Exhibits 1c-e, 3, 4a-c, 5-7, 8a-d (which correspond to Respondent's Exhibits 117-121), 9, 12d pp. 380-381, 15a-c, 16b, 18, 20, 25 (95:11-96:1 and 109:6-110:6), and 26 were admitted by stipulation of the parties at hearing. Charging Party's Exhibits 10-11 were admitted by stipulation under seal.

Respondent's Exhibits 100-115, 117-124, and 130-132 were admitted by stipulation of the parties at the hearing. Respondent's Exhibits 123-126 were admitted by stipulation under seal, and Exhibit 116 was partially admitted by stipulation under seal, with the medical lab reports on pp. 2-4 and 15-17 removed. Respondent's Exhibits 125-128 were admitted over objection. Respondent's Exhibit 129 was rejected.

The parties submitted post-hearing briefs, which was completed on or around June 4, 2019. Based on the evidence adduced at hearing and the arguments of the parties in their closings at time of hearing and in their post-hearing briefing, the following Hearing Officer decision is rendered.

II. ISSUES

1. Did Applied Materials discriminate against Talarico in her pay on the basis of sex against her in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If Applied Materials did illegally discriminate against Talarico as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If Applied Materials did illegally discriminate against Talarico as alleged, in addition to an order to refrain from such conduct, what should the Department require to correct and prevent similar discriminatory practices?

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III. FINDINGS OF FACT

Talarico's Charge of Discrimination

1. Talarico filed an Amended Charge of Discrimination on April 14, 2017 against Applied Materials.

2. Talarico's claim of discrimination was pled under the Montana Human Rights Act and Title VII of the Civil Rights Act of 1964, and was specifically premised on the sole allegation that Applied Materials paid her less than Gordon Senkyr (Senkyr), a male co-worker.

3. Talarico did not plead a claim under the Equal Pay Act, 29 U.S. C. § 206(d), in her Amended Charge of Discrimination, nor did she further amend to include such a claim.

4. Talarico did not plead a retaliation claim in her Amended Charge of Discrimination, nor did she further amend to include such a claim.

5. To the extent retaliation may have occurred, as described by Talarico, any retaliatory acts which took place during the pendency of the present proceedings, were not related to the underlying charges of discrimination, and occurred after the Human Rights Bureau had already reviewed her claims.

6. Applied Materials has two facilities in Kalispell, Montana. One of the facilities is located on Reserve Drive; the other facility is referred to as the Birch Grove facility.

7. The Birch Grove facility manufactures parts and assemblies that are used by Applied Materials' customers to make computer chips.

8. Applied Materials has written antidiscrimination policies in place.

9. Talarico began working at Applied Materials' Birch Grove facility in 2013.

10. Initially, Talarico was employed by a temporary agency and assigned to Applied Materials' main plant on Reserve Drive. Talarico worked as a temporary worker for approximately one month before she applied for a regular, full-time position as a Welder I at Applied Materials' Birch Grove facility.

11. When Talarico applied for the Welder I position, she submitted a written application for employment.

12. On her written application, Talarico listed the following prior work experience:

- (a) one month with Applied Materials as a temporary tech prep with the job duties of filing test procedures, preparing tools, and creating documents;
- (b) three weeks as a welder on a remodel job with Catamount;
- (c) a summer internship with Neptune Aviation as a non-destructive testing tech;
- (d) approximately one and a half years at Target as a member of the Logistics/Flow Team; and
- (e) her previous experience as a tech prep at Applied Materials' predecessor in Kalispell, Semitool, filing test procedures, preparing tools, creating documents, and tech training.

13. The only work-related welding experience listed on Talarico's application was the three weeks welding with Catamount.

14. Talarico omitted from her written application that she had worked at North Valley Steel as a welder for one month before being terminated for not learning quickly enough.

15. In her written application, Talarico requested \$14 per hour as her starting rate of pay. (Ex. 104.)

16. On March 28, 2013, Applied Materials offered Talarico a Welder I position earning \$14 per hour, and she accepted. She began working as an Applied Materials' employee in the Welder I position on April 8, 2013.

17. Applied Materials determined Talarico's starting salary based on her three weeks of prior experience as a welder, her requested rate of pay, and the pay range in effect for its Welder I employees at the time.

Creation of Applied Materials' Quality Control Department

18. Before 2016, the Applied Materials' Birch Grove facility did not have a stand-alone, dedicated Quality Control department. Inspections of the products

being manufactured at Birch Grove were conducted by production employees, under the supervision of production managers.

19. In January, 2016, Birch Grove's management established a separate, stand-alone Quality Control department managed by Alan Johnson (Johnson).

20. To staff the Quality Control department, Applied Materials hired Senkyr on January 4, 2016 in a regular, full-time Quality Control I position earning \$17 per hour. His starting pay rate was determined by a variety of factors, including the amount he earned from the temporary agency, his 26 years of manufacturing experience, his performance as a temporary worker (which was rated as outstanding), and the market guidelines for the quality control position.

21. To expand the staffing of the newly formed Quality Control Department, on January 18, 2016, Applied Materials transferred several existing production employees into Quality Control I positions reporting to Johnson.

22. The internal transfers from production groups into the Quality Control department were lateral moves under the Applied Materials' compensation structure, which states in relevant part that, "lateral transfers within the same grade and base pay structure typically will not result in a change in pay." (Ex. 102.) The policy further provides that, "employee transfers to another department or organization, but remains in his or her current job, job level, and base pay structure." *Id.*

23. Consistent with HR Policy 3-01, none of the production employees transferred from the shop into Quality Control I positions received pay raises in conjunction with the transfers.

24. On January 18, 2016, Robert Hardgrove, who had worked for Applied Materials for more than 20 years and had been doing inspection work from within the machining group for 8 years, was transferred from a Machinist I position in the machine shop into the Quality Control department as a Quality Control I employee. Hardgrove did not receive a pay increase in connection with the transfer.

25. On January 18, 2016, Timothy Harris, who had worked for Applied Materials for over 10 years and had been doing inspection work from within the machining group for 8 years, was transferred from a Machinist I position in the machine shop to the Quality Control Department as a Quality Control I employee. Harris did not receive a pay increase in connection with his transfer.

26. On January 18, 2016, Talarico, who had worked for Applied Materials for less than 3 years and had been doing some inspection work during those 3 years, was transferred from a Welder I position in the welding department to a Quality Control I position in the Quality Control department. Talarico did not receive a pay increase in connection with her transfer.

Job Duties of the Quality Control Employees

27. Although Talarico, Senkry, Hardgrove, and Harris have the same job titles and generically do the same type of work, their actual work is not the same. Each performs different core tasks and each has a different set of skills that are required to perform their specific jobs.

28. Talarico is a Certified Weld Inspector (CWI). Senkyr, Harris and Hardgrove are not CWIs.

29. Talarico's primary duties are conducting weld inspections on a variety of welded frames and qualifying welders.

30. To perform the weld inspections, Talarico utilizes her welding training and expertise, which are skills that Senkyr, Harris and Hardgrove do not possess. Senkyr, Harris and Hardgrove do not perform weld inspections as a normal part of their jobs.

31. Weld inspection typically includes a visual inspection before the welding begins, during the welding process, and after the welding is completed.

32. To qualify welders, Talarico utilizes her CWI. Senkyr, Harris, and Hardgrove do not qualify welders and are not certified to qualify welders.

33. As a CWI, Talarico also drafts procedure qualification records. Senkyr, Harris, and Hardgrove do not draft procedure qualification records and are not certified to draft procedure qualification records.

34. As a CWI, Talarico drafts welding procedure specifications. Senkyr, Harris, and Hardgrove do not draft welding procedure specifications and are not certified to draft welding procedure specifications.

35. Of the inspectors, Senkyr was described by his superiors and co-workers as the most versatile inspector. His main job duties, however, are inspecting machined

parts in the poly (i.e., plastics) department. To inspect machined parts in the poly department, Senkyr uses calipers, height gauges, digital height gauges, a video comparator, and high-tolerance micrometers.

36. Harris inspects poly parts and performs complex leak checks using a surfactant and air pressure.

37. Talarico does not inspect any poly parts.

38. Hardgrove inspects very complicated parts using the CMM (coordinate measuring machine) and other equipment in the department. The parts inspected on the CMM are the most critical parts with the tightest tolerances because they have direct contact with the wafer, which is where the computer chips are made.

39. Talarico does not use the CMM.

40. Although the items they inspect are different, with the exception of Hardgrove's use of the CMM, the measurements and measurement tools used by all of the Quality Control members are generally similar.

How Salaries and Promotions are Determined at Applied Materials

41. For new hires, Applied Materials determines an employee's starting pay rate based on the market ranges for the position being filled, and where a particular candidate fits in the market range for the position based on the candidate's salary expectations, prior relevant work experience, and skills.

42. For existing employees, Applied Materials has an organized and structured system whereby employee performance is evaluated systematically according to predetermined criteria and compensation increase decisions are based on those evaluations.

43. With regard to raises, Applied Materials has an annual performance review process that coincides with an annual compensation review process. These reviews are linked for purpose of setting employee's pay at a rate that correlates with the employee's performance. The current ranking system for the annual review process (which has changed throughout Talarico's tenure) has three levels: (1) approximately 5% of the workforce is rated as a "limited contributor," the lowest ranking; (2) approximately 85% of the workforce is rated as a "valued contributor,"

the middle ranking; and (3) approximately 10% of the workforce is rated as an "outstanding contributor," the highest ranking.

44. Employee reviews are a multi-level, bureaucratic process. At the first step in the annual review process, the employee completes a self-evaluation. At the second step, the employee's immediate supervisor, referred to as the Level I manager, reviews the employee's self-evaluation and completes a review of the employee's performance for the year. At the third step, the Level II manager reviews both the employee's self-evaluation and the Level I manager's review.

45. If the Level II manager approves the evaluation, it is sent to the corporate level for final approval. If the Level II manager has any concerns with the review, the Level II manager can send it back to the Level I manager or to the employee to address the concerns. Once the review is approved at the corporate level, the Level I manager meets with the employee and provides the final review.

46. Following the review process, Applied Materials' awards annual merit pay increases and promotions based on what was described as an established process and guidelines, with the focus being on the results of the employee's annual performance reviews. (Ex. 102.) Applied Materials also, on occasion, provides pay adjustments that recognize changes in market conditions. *Id.* In reality, the process for determining raises is based largely on broad cost control and budgetary concerns, and how each individual raise will impact those broader considerations.

47. The process for completing the annual compensation review begins with a recommendation from the Level I manager as to where each employee falls within the market range for her position and annual performance. Those recommendations are sent to the Level II manager, who then reviews the recommendations against the market range, the employee's performance, and the budget available for compensation increases. Budget is a paramount concern. After the Level II manager has completed his or her review, the Human Resources (HR) Department and the executive team make final approvals.

48. As part of its annual performance review process and its annual compensation review, Applied Materials reviewed each of the employees in the Quality Control department annually.

49. Applied Materials mostly raises employees' salaries on a percentage basis. Thus, if one employee is making less than another prior to a raise, even if both employees perform the same in a given year and receive an identical percentage

increase, the one with a lower starting salary will receive a lesser pay raise in terms of absolute dollar value. Furthermore, as time goes on, the absolute dollar value gap between the higher and lower salaries would increase if both continued to receive identical percentage increases, although the percentage difference between the salaries would remain the same. Stated otherwise, an employee who starts at a lower salary will stay at a lower salary relative to their peers absent an adjustment for the difference.

Senkyr's History and Job Performance and Pay

50. In 2014, the frame workload at Applied Materials' Birch Grove facility was increasing, which, in turn, increased its sheet metal production and the need for sheet metal inspection.

51. To address backlog in sheet metal inspection, Gordon Senkyr started working onsite at Applied Materials in October 2014 as a temporary worker at a salary of \$16.50 per hour.

52. LC Staffing, not Applied Materials, was Senkyr's employer when he was a temporary worker.

53. Senkyr had 26 years of prior experience in sheet metal fabrication operating a press brake, shears, using various measurement tools, and was experienced in reading blueprints. Senkyr did not have prior experience specifically in quality control.

54. Senkyr was an expert in mechanical assembly, experienced with using cutting and measuring tools including calipers, and qualified in blueprint interpretation. Senkyr's experience enabled him to provide Applied Materials' immediate help for its pressing need to catch up on sheet metal inspections.

55. Senkyr's performance as a temporary worker was deemed "outstanding" by his supervisors and he moved from sheet metal inspections to inspecting more complex machined parts within his first month as a temporary worker at Applied Materials.

56. Talarico is of the belief that, because of the differences between her job and Senkyr's job and her certifications, she should be paid more than Senkyr.

57. In 2016, Senkyr received a "valued contributor" performance review rating. In the performance review, Johnson described Senkyr as dependable and hardworking, and stated that Senkyr's willingness to learn and grow within the Quality Control Department was unmatched. (Ex. 123.)

58. Johnson explained in his testimony that Senkyr's performance was "outstanding." (Tr. 141:13-142:19.) He described Senkyr as a "workhorse" and characterized his work ethic as unmatched. *Id.* Johnson did not have to put work in front of Senkyr, but rather Senkyr sought out that work.

59. Based on his performance in 2016, Senkyr received a merit-based pay increase on January 1, 2017, to \$17.26 per hour.

60. In 2017, Senkyr received an "outstanding contributor" performance review rating. (Ex. 124.) The outstanding contributor rating is reserved for only the top 10% of the workforce. (Tr. 679:5-7.) Senkyr earned the rating of outstanding contributor because he stepped up and filled an urgent need for Birch Grove's inspection team. (Ex. 124.) Due to the growth in the number of assemblies being produced, there were final assemblies being shipped to customers with quality issues, and Senkyr got an "outstanding contributor" rating in large part because he took over the final inspection of the assemblies and the quality issues stopped. (Tr. 148:3-149:22.) Senkyr was also known for having a very good attitude.

61. Based on Senkyr's performance throughout 2017, Julie Blodgett (Blodgett), Applied Materials' HR "Business Partner" in Kalispell, described him as "our rock star." (Tr. 725:15-20.) Specifically, she stated that she hears nothing but amazing things about Senkyr's work ethic, performance, and ability to take on challenges and show initiative. *Id.*

62. Based on his performance in 2017, Senkyr was promoted to a Quality Control II position and received a merit-based and promotional pay increase to \$17.61 in January 2018.

Talarico's Job Performance and Pay

63. Talarico displayed a generally unhappy attitude toward Applied Materials. In her 2014 performance review, Talarico stated, "There is a serious lack of respect in the welding shop and I personally do not trust anyone." (Ex. 118.)

64. In her 2015 performance review, Talarico expressed her frustration over management's failure to compensate her for her achievements and what she had attained, and noted that, ". . . the average, plebeian Applied Materials' employee's opinion has no place in this company." (Ex. 119.) She went on to say that, "No matter how good a case I make for myself, it doesn't change anything. It is up to management to appropriately acknowledge their employees." *Id.*

65. Johnson had concerns in early-2016 about the amount of time Talarico was spending on her cell phone and the amount of time she was spending using Applied Materials' computer (which is offset from the main work area) for personal e-mails. Johnson discussed his concerns with Talarico, which elicited a response that Applied Materials was unconcerned about her and her child, and that instead of being home with her child, she was stuck working at what was termed a "shit-hole." (Tr. 156:20-159:3.)

66. Notwithstanding Talarico's attitude, in her 2016 performance review, Johnson stated that Talarico's inspection work was very detail-oriented and that she had the skills to succeed in the Quality Control department, and gave her a "valued contributor" rating. *Id.* Johnson believed Talarico had improved her performance over the course of the year, and he did not want a couple of bad months reflected in her review.

67. Based on her performance in 2016, Talarico received a merit-based pay increase to \$15.25 per hour.

68. On or about the day Talarico received her 2016 performance review and notice that her pay would increase from \$15.02 to \$15.25 per hour, Talarico told Johnson that she thought she deserved a promotion and a bigger raise. Johnson informed Talarico that she would have to discuss her request with Jonathan Kuntz (Kuntz).

69. On November 16, 2016, Talarico met with Kuntz. Talarico requested a promotion to Quality Control II and a pay raise to \$20 per hour, which was over 30% more than her current wage. Talarico thought she should be paid \$20 per hour because that was what some machinists and welders were making.

70. Kuntz was open to negotiation, but believed the \$20 per hour rate requested by Talarico was ridiculously high, which tinged his view of the request.

71. The following day, Kuntz emailed Blodgett and provided a recap of his meeting with Talarico, his initial thoughts on her request, and sought advice on how to proceed.

72. After receiving Kuntz's email, Blodgett met with both Johnson and Kuntz to review Talarico's request. They reviewed Talarico's pay and performance against the market range set by Applied Materials and compared Talarico's overall performance to the other members of the Quality Control department and their respective positions in the market range. It was ultimately determined that Talarico was being paid at the appropriate level.

73. While Blodgett who had very little direct contact with Talarico and thought Talarico was being compensated well for how she was performing, she recommended to Johnson and Kuntz that they put together a development plan to support Talarico and to help her advance in her career. (Ex. 109.)

74. Although Applied Materials attempted to characterize its response to Talarico's request as a positive that would potentially reward her with a pay increase and promotion was a positive development because Talarico was an employee who had drive, initiative, and wanted to make more money and advance her career, no one from the company could recall a situation in which an employee had been placed on a development plan that was not disciplinary and part of corrective action.

75. The use of a development plan in Talarico's situation was in part to address lack of other, objective metrics which could be used as goals for Talarico to "earn" a promotion and pay increase.

76. The development plan that Applied Materials put into place took the items from Talarico's list of job duties, and prioritized the duties Talarico needed to focus on to advance. (Exs. 108, 109.) The principal focus of the development plan was weld inspections because that was the critical work that Applied Materials needed Talarico to perform. (Ex. 109.) Focusing on weld inspections was also the most direct way for Talarico to earn a raise because her highest value to Applied Materials was as a weld inspector.

77. On December 14, 2016, Johnson met with Talarico and addressed the items she had raised with Kuntz, discussed the needs of the business, and discussed her personal development plan. (Ex. 110.)

78. Applied Materials experienced high demand for its frames in 2017, and Talarico was able to improve her performance and adhere to the development plan. Talarico's volume of weld inspections also increased in 2017 with Birch Grove's increased production of frames.

79. As a result of Talarico's performance, she received a special pay adjustment in June, 2017, to \$16.25 per hour.

80. At the end of 2017, and based on her performance for the entire year, Talarico received a rating of "valued contributor" on her performance review. (Ex. 8-E.) Talarico's rating was based on her strong inspection skills, increased workload, work on the Pillar II audit, and work and knowledge of welding specifications. (Ex. 8-E.) Based on her performance and the increased workload, Talarico was promoted to a Quality Control II position and received a merit-based and promotional pay increase to \$17.28 per hour in January, 2018.

81. Talarico was of the opinion at hearing that she believes an appropriate job title for her should be CWI, and not Quality Control. (Tr. 636:7-637:12.)

82. In her 2017 Performance Review, Talarico stated:

I am currently a QC 1 and believe I satisfy the job requirements/duties for at least a QC 2. However, I think it would be more appropriate for my job title to be a CWI as that as [sic] my primary job and all my duties are associated with welding inspection, qualifying procedures and certifying welders. All of the Pillar II documentation [(relating to internal performance measures)] and the Weld Org Chart list me as the CWI responsible.

(Ex. 121.)

Harris' and Hardgrove's Job Performance and Pay

83. For his performance in 2017, Timothy Harris received a "valued contributor" performance review rating. (Ex. 126.) Harris took on the task of preparing a highly detailed formal FAI for every inspection conducted on every product that leaves Birch Grove. Based on his performance and the additional work, Harris was promoted to Quality Control II position and received a merit-based and promotional pay increase to \$17.55 per hour.

84. For his performance in 2017, Robert Hardgrove received a "valued contributor" performance review rating. (Ex. 125.) Hardgrove earned the rating because he began to run the CMM, which allowed Birch Grove to keep the CMM running during the night shift, eliminating a production bottleneck. Based on his performance and the additional work of running the CMM, Hardgrove was also promoted to a Quality Control II position and received a merit-based and promotional pay increase to \$17.28 per hour in January 2018.

85. After the January, 2018, raises and promotions, Senkyr continued to be the highest paid of the group and was the top performer in the eyes of Johnson and Kuntz. Harris was the next highest performer, with Hardgrove and Talarico the next highest performers at the lowest salaries of \$17.28 per hour.

86. Talarico was the only female employee in Quality Control.

IV. DISCUSSION

A. Claims at Issue

Montana law prohibits employers from “discriminat[ing] against a person in compensation or in a term, condition, or privilege of employment because of sex.” Mont. Code Ann. § 49-2-303(1)(a); *see also* Admin. R. Mont. 24.9.604(2). Montana law also prohibits retaliation against an employee by employer for engaging in protected activity. Mont. Code Ann. § 49-2-301. The provisions of the Montana Human Rights Act (MHRA) prohibiting discrimination mirror the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* Because the MHRA is patterned after Title VII of the Civil Rights Act, Montana courts look to guidance from federal court decisions when construing provisions of the MHRA. *See BNSF Ry. Co. v. Feit*, 2012 MT 147, ¶ 8, 365 Mont. 359, 281 P.3d 225.

I. Equal Pay Act

The parties are in dispute as to whether Talarico properly asserted claims under the federal Equal Pay Act (EPA), 29 U.S.C. § 604(d), which is part of the Fair Labor Standards Act (FLSA) but is administered and enforced by the Equal Employment Opportunity Commission (EEOC). It may be advantageous for a party to bring both EPA and MHRA / Title VII claims due to differences in burdens of proof and available remedies. Because Talarico properly asserted a claim of sex discrimination based on unequal pay under the MHRA, however, the issue is moot insofar as the applicable analytical framework is concerned. Pursuant to federal law,

equal pay claims arising under Title VII are subject to the same framework applied to claims asserted under the EPA. *See Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988) (citing *Gunther v. County of Washington*, 623 F.2d 1303, 1313 (9th Cir. 1979)). Because this tribunal's jurisdiction is limited to enforcement of the MHRA, however, it lacks authority to order any remedy beyond that which is enumerated in Mont. Code Ann. § 49-2-506. *See Auto Parts of Bozeman v. Employment Relations Div.*, 2001 MT 72, ¶ 38, 305 Mont. 40, 23 P.3d 193; *see also* Mont. Code Ann. § 49-2-512(1) (regarding MHRA as the exclusive remedy for the acts prohibited thereunder). This Decision makes no ruling as to whether Talarico properly asserted a claim separate and apart from the MHRA under the EPA, nor would the Hearing Officer have jurisdiction to make such a decision. *Id.*

ii. MHRA / Title VII

Even though Talarico's EPA claim arises under the MHRA (and Title VII, by way of application of its standards), she has a more expansive, generalized sex discrimination claim under Title VII. The protections of the MHRA and Title VII go beyond what is provided by the framework of the EPA, and do not require a showing of comparators who perform substantially equal work. *See Lenzi v. Systemax, Inc.*, 944 F.3d 97, 110-11 (2d Cir. 2019). Under the MHRA and Title VII, Talarico may simply show she was discriminated against with respect to her compensation because of her sex: "Thus, a claim 'for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit, quantity or quality of production, or any other factor other than sex.'" *Lenzi*, 944 F.3d at 111 (quoting *Gunther*, 452 U.S. at 168 (internal quotation marks omitted)).

iii. Retaliation

With regard to the retaliation claims asserted by Talarico, the Hearing Officer recognizes that Montana is a notice pleading state, but even under notice pleading standards, Applied Materials was never on sufficient notice that Talarico was making a retaliation claim. "Pursuant to Rule 8(a), M. R. Civ. P., a complaint must put a defendant on notice of the facts the plaintiff intends to prove; the facts must disclose the elements necessary to make the claim; and the complaint must demand judgment for the relief the plaintiff seeks." *Kunst v. Pass*, 1998 MT 71, ¶ 35, 288 Mont. 264, 275-76, 957 P.2d 1, 8 (citing *Mysse v. Martens*, 279 Mont. 253, 266, 926 P.2d 765, 773 (1996).) "The liberal notice pleading requirements of M. R. Civ. P. 8(a) . . . [does] 'not go so far to excuse omission of that which is material and necessary in order to entitle relief,' and the 'complaint must state something more than facts

which, at most, would breed only a suspicion" that the claimant may be entitled to relief." *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 16, 407 P.3d 692, 696 (quoting and citing *Jones v. Montana University System*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247; *Ryan v. City of Bozeman*, 279 Mont. 507, 512, 928 P.2d 228, 231 (1996); *Mysse*, 279 Mont. at 266, 926 P.2d at 773.) Although the complaint in a human rights case is less formal than a standard civil complaint, Talarico never asserted any claim for retaliation in either her original or amended charges. *See* Admin R. Mont. 24.8.203(1)(c) (a complaint must contain "a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful discriminatory practice"). Indeed, Talarico was asked several times during her depositions if she was asserting a claim for retaliation as well as in requests for admission. She stated she was not. (1/16/2018 Talarico Depo. (Talarico Depo. #1) at 121:10-13; 150:8-23; 164-165:25-2.) Talarico did assert that Matt Schimming, a coworker, was retaliated against for speaking with Talarico, but never directly related that action to herself in her deposition. (Talarico Depo. #1 at 150-152:4-9; 154-155:20-23.) Even though she filed to amend her charges, at no point did Talarico ever amend her charges with HRB to include retaliation, a fact which she acknowledged during the hearing. (Hrg. Tr. at 667-668:20-2.)

It was not until Talarico's counsel gave her opening statement at the hearing that Talarico's claim for retaliation was fully explained: Applied Materials "retaliated against Amy for filing this claim by reprimanding her for utilizing the open-door policy and discussing wages with coworkers and by removing responsibilities that she had in an attempt to justify lower wages than her male counterparts." (Hrg. Tr. at 17:2-8.) The events for which Talarico claims retaliation occurred during the pendency of her case and after she filed her charges. Furthermore, the retaliation claims have no direct relation to her unequal pay claim. The only similarity between the claims is that they both relate to discrimination based on sex. Had Talarico wished to include these disparate retaliation claims in her charges, she could have amended those charges as she had already done once before. As it stands, however, Talarico's total failure to even allege retaliation in her amended charges acts as a bar to bringing these claims. *See* M. R. Civ. P. 8(a); *see also* Admin R. Mont. 24.9.603.

B. Equal Pay Claim

In order to establish she was discriminated against on the basis of pay pursuant to the Equal Pay Act, Talarico has the initial burden to establish a prima facie case of wage discrimination. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). A prima facie case is established by showing that employees of the opposite sex were paid different wages for equal work for jobs that require "equal

skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1); *see also Corning Glass Works*, 417 U.S. at 195. In determining whether the jobs are equal, the first inquiry is to determine whether the jobs have the same "common core" of tasks. *See Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1073-74 (9th Cir. 1999). If a significant portion of the tasks are the same, consideration is given to whether, overall, the jobs require substantially "equal skill, effort, and responsibility" and are performed under "similar working conditions." 29 U.S.C. § 206(d)(1). This component of the prima facie case is limited to a comparison of the jobs in question and does not involve a comparison of the individuals who hold the jobs. *See Stanley*, 178 F.3d at 1074.

If Talarico establishes a prima facie case, the burden shifts to Applied Materials to rebut by proving that a disparity in pay is a "differential based on any . . . factor other than sex[,]" including a seniority, merit, or production-based compensation system that does not consider sex. 29 U.S.C. § 206(d)(1); *see also Corning Glass Works*, 417 U.S. at 195; *Gaujacq v. EDF, Inc.*, 601 F.3d 565, 575 (D.C. Cir. 2010). Due to a combination of no Montana law on the issue and complicated federal case law which is not always consistent between (or even within) the Circuits, there is some confusion between the parties as to application of the EPA standards in an MHRA case. Applied Materials asserts that because Talarico's equal pay claim arises under the MHRA, she must still show discriminatory animus. *See, e.g., Belfi v. Prendergast*, 191 F.3d 129, 139 (2d Cir. 1999) (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995)) ("In addition to the requirements that are generally the same as those under the EPA, 'a Title VII plaintiff must also produce evidence of discriminatory animus in order to make out a prima facie case of intentional sex-based salary discrimination.'"). Because of the holding of the recently-decided *Rizo* case, quoted below, the Hearing Officer interprets the discriminatory animus requirement to only apply to a broader sex discrimination claim under Title VII¹, which is available to Talarico even though she has asserted an equal pay claim and is analyzed under a burden-shifting framework that does require a showing of discriminatory intent.

Some cases have also stated a charging party may rebut an affirmative defense with evidence that it is merely pretextual, and that the respondent intended to discriminate on the basis of sex. *See, e.g., Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986). This statement is not correct when applying the EPA framework, as explained in a recent decision of the 9th Circuit:

¹ "Title VII" is generically used here to refer to a sex discrimination claim arising under the MHRA that is not strictly an equal pay claim.

We agree that our case law has confused this point. Likely because of dicta in our previous cases, the district court suggested that Rizo would bear the burden of showing pretext if the County demonstrated that a factor other than sex accounted for Rizo's pay. This is not correct. To clear up any confusion, we reiterate that EPA claims do not require proof of discriminatory intent. *See Maxwell*, 803 F.2d at 446; *see also Ledbetter* [*v. Goodyear Tire & Rubber Co.*], 550 U.S. [618,] at 640 [(2007)]. EPA claims have just two steps: (1) the plaintiff bears the burden to establish a prima facie showing of a sex-based wage differential; (2) if the plaintiff is successful, the burden shifts to the employer to show an affirmative defense. No showing of pretext is required.

Rizo v. Yovino, 950 F.3d 1217, 2020 U.S. App. LEXIS 6345, 14 (9th Cir. 2020) (official reporter pinpoint pagination not yet available). Although different remedies between EPA and Title VII claims are not available in this forum, it may nonetheless be advantageous for a party to bring both types of claims because of the different evidentiary burdens associated with each type of claim.²

I. Prima Facie Case

With regard to Talarico's prima facie case, she established that she was paid less than her male counterparts in Quality Control. The question then becomes whether their respective jobs require equal skill, effort, and responsibility, and whether they are performed under similar working conditions. 29 U.S.C. § 206(d)(1). As pointed out by Talarico, she is not required to show the jobs performed by the various Quality Control employees—and Senkyr in particular—were identical, but only that they were substantially equal. 29 C.F.R. § 1620.13(a); *see also Gunther v. Cnty. of Wash.*, 623 F.2d 1303, 1309 (9th Cir. 1979), *aff'd* 452 U.S. 161 (1981). The relevant inquiry in determining whether two jobs are substantially equal is whether they have a common core of tasks such that a significant portion of the two jobs is identical. *Stanley*, 178 F. 3d at 1074 (quoting *Brobst v. Columbus Srvs. Int'l*, 761 F.2d 148, 156 (3d Cir. 1985)). When a charging party establishes such a common core of tasks, it must then be determined whether any additional tasks,

² Even if an EPA claim arises under Title VII, as here, the analysis is still handled separately from the Title VII claim, albeit there is some disagreement among the courts as to whether success or failure on one type of claim is dispositive as to the other. For purposes of this decision, both types of claims will be analyzed.

incumbent on one job but not the other, make the two jobs substantially different. *Id.*

Talarico admits that her job and that of Senkyr were not absolutely identical. She argues, however, that both were Quality Control employees with the same titles and, for a portion of time, both inspected sheet metal, poly and small machine shop parts and performed leak tests in the same building. The issue of substantial equality goes beyond job titles, and requires an analysis of "actual job performance and content." *Gunther*, 623 F.2d at 1309. To that end, both Senkyr and Talarico almost exclusively performed inspections while working for Quality Control. Applied Materials argues that because the items they were inspecting were so different, any comparison is nonsensical, and notes that there was little attempt by Talarico to directly compare job tasks. Talarico's job primarily involves inspecting welds and performing tasks specific to a CWI, while Senkyr's job does not involve anything related to welds, and instead primarily involves inspecting parts in the poly department, which Talarico's job does not include. The fact of the matter, however, is that the common core of tasks between the jobs, which involve measurements for purposes of quality control, remain the same. Based on the totality of the evidence presented at the hearing, with the exceptions of the positions requiring specialized use and programming of computerized measuring equipment, the Quality Control jobs all require the same types of underlying measurements and measuring tools to make those measurements, and are substantially equal. In other words, regardless of the label placed on the positions in Quality Control or the type of parts inspected, the common core of tasks between the jobs of Talarico, Senkyr, and Harris were substantially equal.

Talarico had also previously done work more similar to that of her male counterparts, and the way in which Talarico's duties changed is somewhat suspect, regardless of Applied Materials' increased workload with frames and weld inspections. Talarico had initially worked on sheet metal and poly inspection, and was moved to sheet metal and welding and then eventually exclusively welding because of her unique qualifications in that area and the needs of Applied Materials for someone with her certifications. (Tr. at 488:2-13.) As Talarico moved around within Quality Control, no change or clarification was ever made as to her specific role. *Id.* Talarico was taken off sheet metal and other non-welding inspection jobs two weeks after her deposition in this matter. (Tr. 605:6-11; Ex. 12 (bates 378, 381).) Prior to this change, Talarico inspected in other areas at the same time Senkyr was in Quality Control. *Id.* Again, this fact simply serves to reinforce the idea that the common core of tasks among the Quality Control employees was so similar as to be interchangeable between them.

Applied Materials discounts Talarico's arguments that she was more valuable to Applied Materials than Senkyr because of her position and unique skills. By emphasizing her additional responsibilities with weld inspection, Applied Materials asserts Talarico is admitting that her job is not substantially equal to Senkyr's. As the courts have held, though, the fact that a charging party has these unique skills which create additional duties does not defeat showing substantial equality of jobs. *See Hein v. Oregon College of Education*, 718 F.2d 910, 917 (9th Cir. 1983). If anything, Talarico's argument simply shows there is, in fact, a common core of tasks between all jobs in quality control, and that she not only performs a substantially equal job to that of Senkyr and Harris, but also does more, as with Hardgrove. *Id.*

Applied Materials also attempts to discount Talarico's comparison of her qualifications and, more specifically, her resume with that of Senkyr. While it is true that a charging party's prima facie case is "limited to a comparison of the jobs in question, and does not involve a comparison of the individuals who hold the jobs[,]" those things are relevant to Applied Materials' defenses. *Stanley*, 178 F.3d at 1074. As such, they will be addressed later in this decision.

On the whole, Talarico has been able to establish a prima facie case with regard to her EPA claim. She has shown that her job is substantially similar to that of both Senkyr and Harris, both of whom are male and earn more than Talarico, with the exception of Harris during the most recent round of raises. The burden now shifts to Applied Materials to rebut Talarico by proving that a disparity in pay is based on any factor other than sex.

ii. Affirmative Defenses

Applied Materials has argued several factors other than sex which account for Talarico's wage disparity. *See* 29 USC § 206(d)(1). To reiterate, there are four affirmative defenses: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex. *See Corning Glass Works*, 417 U.S. at 195; *Gaujacq*, 601 F.3d at 575; *see also* 29 U.S.C. § 206(d)(1). Because Applied Materials' affirmative defenses blend across the gamut of seniority, merit, and other factors, they will be addressed together as a whole.

To counter a prima facie case, an employer must prove "not simply that the employer's proffered reasons could explain the wage disparity, but that the proffered reasons do in fact explain the wage disparity." *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 121 (4th Cir. 2018). The factors put forth by a business can be broad, and can

embrace almost anything to form a defense to unequal pay so long as sex is not a factor. *See Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989) (citing and quoting *Corning Glass Works*, 417 U.S. at 197). Application of other factors is somewhat akin to the business judgment rule of corporate law, as courts and administrative agencies are not permitted to substitute their judgment for the judgment of the employer, so long as it does not discriminate on the basis of sex. *Cnty. of Wash.*, 452 U.S. at 171 (citations omitted). As courts have reasoned, the employers, not judges, must be able to make decisions regarding how to accomplish business objectives. *Hein*, 718 F.2d at 921 (quoting and citing *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982), overruled on other grounds by *Rizo v. Yovino*, 887 F.3d 452 (9th Cir. 2018)). However, any proffered defense may not be discriminatory on its own. *See, e.g., AT&T Corp. v. Hulteen*, 556 U.S. 701, 714, 129 S. Ct. 1962, 1972 (2009) (not directly regarding EPA application, but a seniority system cannot be adopted for an intentionally discriminatory purpose); *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980) (a merit system employer must have an organized, structured procedure whereby employees are evaluated systematically according to predetermined criteria).

Before addressing Applied Materials' affirmative defenses, one factor which could implicate discrimination and which must be rebutted is Talarico's starting pay. Because her pay started low, it resulted in a continuation of lower pay than most of her peers. Regardless of the fact Applied Materials may have had legitimate, nondiscriminatory reasons for setting Talarico's initial salary as it did, if it led to a lower long-term pay rate than her male counterparts, it may nonetheless be discriminatory, regardless of whether sex was considered in determining her pay thereafter.³ *See Rizo*, 2020 U.S. App. LEXIS 6345, 8-9.

In *Rizo*, the 9th Circuit noted that, in prior cases, it found "that the EPA 'does not impose a strict prohibition against the use of prior salary,' so long as employers consider prior pay 'reasonably' to advance 'an acceptable business reason.'" *Rizo*, 2020 U.S. App. LEXIS 6345, 8 (citing and quoting *Kouba v. Allstate Insurance Co.*, 691 F.2d 873, 876-78 (9th Cir. 1982)). The court ultimately concluded that "the EPA does not prevent employers from considering prior pay for other purposes[,]" such as

³ For example, if Employee A started at \$15.00 per hour and Employee B started at \$15.50 per hour and both received 5% pay increases for two years, Employee A would receive a \$0.75 increase in the first year to \$15.75 and a \$0.79 increase in the second year to \$16.54, while Employee B would receive a \$0.78 increase in the first year to \$16.28 and an \$0.81 increase in the second year to \$17.09. The absolute gap between the salaries would rise from \$0.50 to \$0.53 to \$0.55, although the lower salary would remain 96.77% of the higher salary in relative terms throughout the time periods.

"in the course of negotiating job offers, . . . [b]ut whatever factors an employer considers, if called upon to defend against a prima facie showing of sex-based wage discrimination, the employer must demonstrate that any wage differential was in fact justified by job-related factors other than sex. Prior pay, alone or in combination with other factors, cannot serve as a defense." *Rizo*, 2020 U.S. App. LEXIS 6345, 34. Allowing an employer to rely on prior pay alone to justify an ongoing lower pay rate would risk "perpetuating historical sex discrimination." *Id.*, 2020 U.S. App. LEXIS 6345, 35.

Although it is by no means the only factor relied upon by Applied Materials, Talarico's low starting salary did play a role in perpetuating lower pay than her male counterparts. As explained in footnote 3 herein, even if Talarico was given identical percentage wage increases as her male counterparts, a lower starting salary would keep her salary continually low. However, when Applied Materials set Talarico's starting salary in a Welder I position at \$14 per hour, it considered several factors unrelated to Talarico's sex. Perhaps most relevant to this discussion, Applied Materials gave Talarico the exact starting salary she requested in her written application. At the time she started, Talarico only had three weeks of prior welding experience. No broad evidence was presented as to what other Welder I positions were paying at the time, but Applied Materials determined that \$14 per hour was consistent with the pay range for its Welder I employees. Sex was therefore not a factor in determining Talarico's starting wage.

Talarico was eventually moved from her Welder I position into the Quality Control department. Applied Materials' Birch Grove facility did not have a standalone, dedicated Quality Control department when Talarico was hired, and instead had its production employees inspect products produced at the facility, under the supervision of production managers. When Applied Materials created its Quality Control department in January, 2016, it staffed the department in part with existing employees from various production groups, including Talarico. Consistent with its policy providing that lateral transfers typically did not result in pay changes, Applied Materials did not give any of the production employees it transferred to Quality Control I position pay raises. Talarico was not treated any differently in this regard than her male counterparts.

At the time of their transfers, Harris and Hardgrove had significantly more experience in their disciplines than did Talarico and were earning more as a result. Talarico had less than three years of experience when she transferred from a Welder I position into Quality Control. Hardgrove transferred from a Machinist I position with more than 20 years of experience at Applied Materials, including 8 years of

experience conducting inspections as part of the machining group. Harris also transferred from a Machinist I position with more than 10 years of experience at Applied Materials, including 8 years of experience conducting inspections. Neither individual was given a raise as part of the transfer, and was treated no differently than Talarico.

Because Senkyr was previously employed through a staffing agency, Senkyr did receive an increase in pay from \$16.50 to \$17.00 per hour when hired to be part of Quality Control. Although he had only worked with Applied Materials since 2014, Senkyr had 26 years of prior experience, significantly more than any of his counterparts. The Quality Control position was offered at \$17 per hour to incentivize him to take the position. Sex was not a factor in this decision.

With regard to raises, as set forth in the Findings of Fact, Applied Materials has a multi-step merit system for setting pay. An annual performance review process is used to set employees' compensation at a rate commensurate with performance. Presently, that system uses a three-level rating process, with "limited contributor" being the lowest rating, "valued contributor" being the middle ranking, and "outstanding contributor" being the highest ranking. The evaluation process includes an employee self-evaluation, a review and evaluation by the employee's immediate supervisor, a review by an upper-level manager, and final approval at the corporate level. Annual merit pay increases and promotions are based on established processes and guidelines, with the focus being on the results of the employee's performance review. Pay adjustments may also be based on changes in market conditions.

The process for completing an employee's annual compensation review begins with a recommendation from the employee's immediate supervisor as to where each employee falls within the market range for their position and performance. An upper level manager reviews the recommendations, considering the market range, the employee's performance, and the budget available for compensation increases. Finally, the Human Resources Department and Applied Materials' executive team make final compensation approvals.

Here, the Quality Control employees' starting salaries were based on factors other than sex. From the creation of the Quality Control department, Talarico's level of pay was based on its merit system. When Talarico transferred laterally to the Quality Control department, she was earning \$14.65 per hour because that was her salary as a Welder I at the time. Senkyr was hired at \$17.00 per hour based on both his experience and as an incentive to join the group. In April, 2016, Talarico received approximately a 2.5% pay increase to \$15.02 per hour based on her 2015

performance review. Because Senkyr was a new hire, he was not eligible for a merit-based raise in 2016. Talarico was rated as a valued contributor in her 2016 performance review and received a 1.5% pay raise from \$15.02 per hour to \$15.25 per hour in 2017. Senkyr was similarly rated as a valued contributor in his 2016 performance review and was also given a 1.5% pay raise from \$17 per hour to \$17.26 per hour.

Following her review in 2016, Talarico requested a raise to \$20 per hour—a roughly 30% increase in pay—because she believed welders elsewhere were earning that much. (It should be noted that, in spite of Talarico’s advanced certifications, she was not as experienced in welding as the full-time welders, nor was that her job in Quality Control.) As a result and after her managers met with Human Resources, she was placed on a development plan. Although Applied Materials described the development plan as non-punitive, no one from the company could recall a situation in which an employee had been placed on a development plan that was not disciplinary and part of corrective action. With that having been said, it appears Applied Materials’ use of the development plan, which was initially suggested by Blodgett who had little contact with Talarico, was not directed at Talarico because of her sex, but rather was used as a method of cost control, which was of paramount concern based on the testimony presented at hearing. By placing Talarico on a development plan, it increased her productivity and placated her while both delaying and moderating the level of any ultimate pay increase. It was, in essence, Applied Materials’ way of denying Talarico’s request while holding out a conciliatory carrot.

The fact that Talarico’s full request was denied does not mean Applied Materials failed to follow through on the development plan. In June, 2017, Talarico received a 6.5% pay increase to \$16.25 per hour based on her progress under the plan. Other Quality Control employees did not receive any mid-year pay adjustment.

Senkyr received an outstanding contributor rating in his 2017 performance review, which only about 10% of Applied Materials' workforce receives. Based on his review, Senkyr was promoted to a Quality Control II position and received a 2% pay raise from \$17.26 to \$17.61. Talarico again received a valued contributor rating in 2017, and was also promoted to a Quality Control II position. She received a 6.3% pay increase from \$16.25 per hour to \$17.28 per hour. Hardgrove and Harris were also rated as valued contributors and received promotions to Quality II positions. Hardgrove received a pay raise to \$17.28 per hour, while Harris received a pay raise to \$17.55 per hour. Although Talarico remained at the low end of the Quality Control group in terms of pay (matching that of Harris), she also had the least experience and seniority of anyone in the group. Her raise was also a bigger

percentage than that of her male counterparts, albeit this reflected her lower starting wage. There again is no indication that any salary increases or promotions were in any way tied to sex as a factor.

On the whole, Applied Materials has set forth several different bases which explain its reasons for setting Talarico's pay as it did which do not implicate sex as a factor. Although pretext is not at issue under an equal pay analysis, even if it was, there was again no indication that Applied Materials' actions amounted to pretext. During the hearing in this matter, counsel for Applied Materials made the argument that Talarico's claims went to the job she wants to do with her various welding certifications, not the job she is actually paid to perform. The Hearing Officer agrees that many of Talarico's arguments do, in fact, go to a generalized argument that she should be compensated for her personal accomplishments and certifications, even though those things are not necessarily required for her job. There is no doubt that Talarico took it upon herself to improve her skill set, but the job she performed for Applied Materials was still that of someone in Quality Control. As it is, Applied Materials has shown that Talarico's initial salary and subsequent raises were based on several legitimate business factors, none of which were based on her sex.

C. Sex Discrimination Claim

Talarico has also made a claim directly pursuant to the MHRA and Title VII, which make pay discrimination unlawful but subject to a different analysis than under the EPA and without the use of comparators but with different burdens of proof. Talarico does not argue discrimination based upon disparate impact. Rather, she argues Applied Materials deliberately treated her differently than her male colleagues due to her gender. "Proof of discriminatory motive is required under a disparate treatment theory, although such motive may be inferred in some situations from the mere fact of differences in treatment." *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453 (9th Cir. 1985) (quoting *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 335-36 n. 15 (1977)). This case is an indirect evidence case because the parties dispute both the reasons for the alleged action and whether such action amounts to illegal discrimination (in contrast to a direct evidence case in which the parties do not dispute the reasons for the employer's action, but only whether such action is illegal discrimination). See *Reeves v. Dairy Queen, Inc.*, 1998 MT 13, ¶ 16, 287 Mont. 196, 953 P.2d 703.

Where there is no direct evidence of discrimination, Montana courts have adopted the burden-shifting test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See, e.g., *Ray v. Mont. Tech of the Univ. of Mont.*, 2007 MT 21, ¶ 30,

335 Mont. 367, 152 P.3d 122. To establish a prima facie case, Talarico must demonstrate by a preponderance of the evidence that: (1) she was a member of a protected class; (2) she was qualified and her job performance met Applied Material's legitimate expectations; (3) she was subjected to adverse employment action; and (4) similarly-situated male employees were treated more favorably. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993)); *see also* Admin. R. Mont. 24.9.610(2). If these elements are met, Applied Materials must articulate a legitimate, nondiscriminatory reason for paying Talarico less than similarly situated male employees. *See Heiat v. Eastern Mont. College*, 912 P.2d 787, 791 (1996); *McDonnell Douglas*, 411 U.S. at 802. Contrary to the EPA standards, the burden of proof remains with Talarico when asserting claims directly under the MHRA / Title VII. *See Villiarimo*, 281 F.3d at 1062.

If Applied Materials articulates a legitimate, nondiscriminatory reason for the pay discrepancy, Talarico must prove by a preponderance of the evidence that Applied Materials' proffered reason is just pretext for sex discrimination. *See Texas Dep't of Cmty. Affairs v. Burdine (Burdine)*, 450 U.S. 248, 254-56 (1981) (citations omitted); *see also* Admin. R. Mont. 24.9.610(3). Pretext may be shown either directly by showing that a discriminatory reason more likely motivated the employer, or indirectly by showing that an employer's argument is not credible. *Burdine*, 450 U.S. at 256; *see also Heiat*, 912 P.2d at 792. Although a plaintiff may rely on circumstantial evidence to show pretext, it must be both specific and substantial. *See Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998).

I. Prima Facie Case

It is undisputed that Talarico meets the first two elements of her prima facie case. She is both a member of a protected class based on her sex and is qualified for her job in Quality Control at Applied Materials, which she performed within expectations. There is a genuine issue, however, as to whether she was subject to any adverse employment action and whether similarly-situated male employees were treated more favorably.

Talarico must demonstrate that Applied Materials took one or more adverse employment actions against her because of her sex. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92-93, 99-100 (2003). An adverse employment action is one that "materially affect[s] the compensation, terms, conditions, or privileges of . . . employment." *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008). Although adverse action is defined broadly, not every employment decision amounts

to an adverse employment action. *See Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). "Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." *See Bishop v. Bell Atl. Corp.*, 299 F.3d 53, 59 (1st Cir. 2002) (quoting *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996)). To determine whether a particular action is materially adverse, the court must employ an objective standard and consider the context and circumstances of the particular case. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68-69, 71 (2006).

Talarico simply dismisses the adverse employment action requirement for discrimination claims and assumes her pay level in itself was an adverse action. As stated, however, her initial pay level was set based on her own request. Subsequent to setting her initial pay, there is no evidence of adverse action related to her employment. Some of Talarico's duties changed over time, but again, not adversely. Being placed on the development plan ultimately worked toward Talarico's benefit, and although it could have been used punitively, it was not.

Similarly, with regard to the fourth element of her prima facie case—*i.e.*, that similarly-situated male employees were treated more favorably—Talarico presented no evidence that her male coworkers were treated differently. As stated, Talarico requested her own starting pay level, and there was no evidence presented that, given her experience level, her starting pay was any different than that of a similarly-situated male counterpart. There is furthermore no evidence she was treated differently than her male counterparts in receiving raises. And, in the case of the development plan, she was actually treated better and given a mid-year raise. It also must be noted that the feedback Talarico provided during her review periods, she did not complain about being treated differently because of her sex. Talarico was not timid in her complaints, which were always directed toward what she viewed as a poorly-run operation. Indeed, throughout the hearing, the issue of different treatment based on sex was essentially never mentioned other than as an afterthought.

Under the totality of the circumstances, Talarico has failed to establish a prima facie case of sex discrimination under the MHRA. It is therefore unnecessary to address Applied Material's reasons for its actions and whether pretext was involved.

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Amanda Talarico, Charging Party, and counsel Santana Caballero of Kortum Law Office, PLLC; and Respondent Applied Materials, Inc., and counsel Jason S. Ritchie and Michael P. Manning of Ritchie Manning Kautz, PLLP:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. **Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.** Mont. Code Ann. § 49-2-505(3)(c) and (4).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, Mont. Code Ann. § 49-2-505(4), WITH ONE DIGITAL COPY, with:

**Human Rights Commission
c/o Annah Howard
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728 Helena, Montana 59624-1728**

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND ONE DIGITAL COPY OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505(4), precludes extending the appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The original transcript is in the contested case file.

Talarico.HOD.cvp